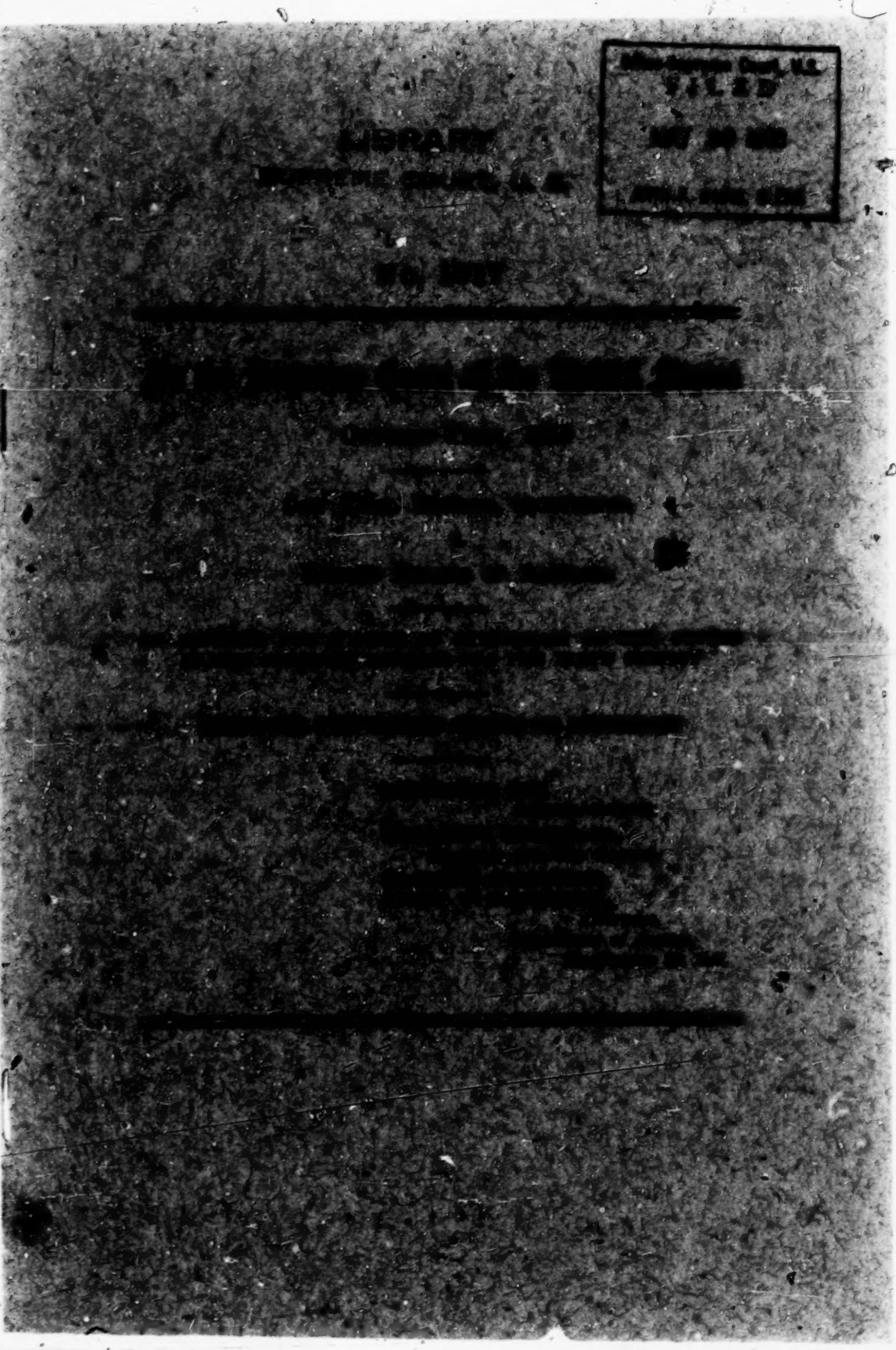

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688194—63

# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. 1017

JAN EMIL DONATO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–2) is reported at 314 F. 2d 67. The earlier opinion of the court of appeals remanding the cause (Pet. App. 3–6) is reported at 302 F. 2d 468.

### JURISDICTION

The judgment of the court of appeals was entered on January 24, 1963. A petition for rehearing was denied on February 26, 1963. By order of Mr. Justice Douglas, the time for filing a petition for certiorari was extended to and including April 15, 1963. The petition for a writ of certiorari was filed on

April 13, 1963. The jurisdiction of this Court is based upon 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in a prosecution for failing to submit to induction in the armed forces, petitioner, having failed to appeal his classification by the local board, was entitled to have the classification reviewed by the district court even though that court found that there was no valid excuse for his failure to appeal.

## STATEMENT

Petitioner seeks review of the judgment of the court of appeals affirming his conviction and three-year sentence, imposed by the United States District Court for the Southern District of California, for refusal to submit to induction under the Universal Military Training and Service Act.

The trial was before the court, jury having been waived. Petitioner's selective service file disclosed that he had filed a claim for exemption as a conscientious objector, but was classified I–A on February 19, 1958. Although petitioner admitted at trial that he was aware of his right to request a personal appearance before the board and to appeal his classification (R. II, 31–32), he did not do so. In June 1960, the board, on its own motion, requested postponement of petitioner's induction for the purpose of reconsidering petitioner's claim to classification as a conscientious objector. On June 21, 1960, the board requested petitioner to present himself for an interview on July 13, 1960. After the interview, the board reclassified him I–A and mailed him Form 110, a notification of such

classification. It was stipulated that petitioner received this form and that it gave him notice of his right to appeal (R. II, 27). Again, however, petitioner did not appeal. Ordered to report for induction on September 23, 1960, petitioner reported but refused to be inducted (R. II, 25–26).

Petitioner testified that he had intended to take an appeal within the ten-day period after receiving notice of the I–A classification sent on July 13, 1960, but that on July 18 he was notified to prepare for fire-fighting service—a duty which petitioner, in connection with his employment in excavation work, had signed up to perform for the United States Forestry Service. At midnight of July 20 he was called to work on a fire and remained at this task until July 28. He had very little time between calls on these fires and usually spent the time sleeping (R. II, 28–30). When he returned from the fire-fighting area, he did not communicate with the board, because he knew that his ten days had expired and believed he could satisfactorily explain his failure when the time came. He understood, however, that a letter to the board would have sufficed to make a request (R. II, 33).

The district court found petitioner guilty. On appeal, the court of appeals held that while the rule requiring exhaustion of administrative remedies applies where failure to appeal is a "deliberate and intentional rejection of the administrative review," there is an area "within which relaxation of the rule can be found to be just and proper." In view of the fact that the record did not show whether the trial court had considered and rejected petitioner's expla-

nation of his failure to take an appeal, the cause was remanded for consideration whether, under all the circumstances, it would be "just and proper" to relax the rule of exhaustion (302 F. 2d 468; Pet. App. 3–6).

Upon remand, the trial court read into the record a certificate to be forwarded to the court of appeals. The certificate stated that the court had made a general finding of guilt, petitioner having waived special findings of fact; it had considered petitioner's excuses and had concluded that in the circumstances a relaxation of the rule requiring exhaustion of administrative remedies would not be just and proper; and that petitioner had had ample time to appeal in the interim between the board's action on July 13 and petitioner's assumption of fire-fighting duties on July 20, of which he had two days' notice. Accordingly, petitioner was re-sentenced to imprisonment for three years (R. III, 40–43).

## ARGUMENT

1. It is well settled that a selective service registrant who fails to exhaust his administrative remedies may not interpose the defense of wrongful classification when he is prosecuted for refusal to submit to induction. *Prohoroff* v. *United States*, 259 F. 2d 694 (C.A. 9), certiorari denied, 359 U.S. 907; *United States* v. *Balogh*, 160 F. 2d 999 (C.A. 2); *McGahee* v. *United States*, 163 F. 2d 875 (C.A. 5); *Jeffries* v. *United States*, 169 F. 2d 86 (C.A. 10); *United States* v. *Nichols*, 241 F. 2d 1 (C.A. 7). Cf. *Falbo* v. *United States*, 320 U.S. 549 (as described and distinguished

in *Estep* v. *United States*, 327 U.S. 114), which held that a registrant who had taken an administrative appeal but had not exhausted his administrative remedies by reporting for induction could not, in a subsequent criminal proceeding, challenge the order of the local board.

In applying that settled principle here, both courts below gave ample consideration to possible mitigating circumstances. At the trial, defense counsel, in his opening statement, declared that "the case really will turn on whether or not there was a good enough excuse for not taking the administrative appeal" (R. II, 8). After the district court's general finding of guilt, the court of appeals remanded the case in order to make sure that the excuses offered by petitioner had been taken into account. The district court thereupon issued a certificate stating that both at the original trial and upon review of the record it had considered petitioner's testimony, balanced the competing considerations, and concluded that under all of the circumstances "a relaxation of the exhaustion of administrative remedies rule would not be just and proper" (R. III, 41). The court further found—quite properly, we submit—that since the petitioner concededly knew he had ten days within which to appeal administratively and had two days' advance notice of his call to fire-fighting duties, it is clear that his omission was deliberate and intentional (R. III, 42–43).

Petitioner argues, however, that the doctrine of exhaustion is inapplicable to this case since the appeal was a purely optional step and since he eventually

did report for induction. That argument, if accepted, would give a registrant the right to disregard the elaborate procedures set up by Congress for review of selective service classifications and would require the courts to act, in the first instance, as boards of review for decisions of the local board. It is not the function of the courts, sitting as "super draft boards," to substitute their judgment for that of the agencies designated by law. Cf. *Witmer* v. *United States*, 348 U.S. 375, 380–381.

2. Petitioner urges that the Fifth Amendment entitled him either to the assistance of counsel before the local board or a trial *de novo* on the facts and law in the district court, since otherwise he would be convicted of a crime on the basis of a record compiled without benefit of counsel. This contention is without merit. As petitioner himself acknowledges (Pet. 10–11), it is well settled both that (a) a denial of counsel before the local selective service board does not offend the due process clause, *Nizuik* v. *United States*, 173 F. 2d 328 (C.A. 6); *Peterson* v. *United States*, 173 F. 2d 111 (C.A. 6); and (b) that a registrant is bound, in a subsequent criminal action, by the board's classification order unless there is no factual basis for it in the administrative record. *Estep* v. *United States*, 327 U.S. 114; *Cox* v. *United States*, 332 U.S. 442; *Witmer* v. *United States*, 348 U.S. 375.

Moreover, petitioner does not attribute his failure to take an administrative appeal to absence of counsel; on the contrary, he concedes that he was well aware of his right to appeal and that it could be exercised simply by writing a letter. Since he failed

to exhaust this administrative remedy, and thus can no longer raise the issue of wrongful classification at all, the question whether he should be given a trial *de novo* in order that counsel may assist in developing the facts pertinent to that issue does not even arise.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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